

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL JEROME JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

October 23, 2007

No. 273025

Saginaw Circuit Court

LC No. 06-027493-FH

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to three years' probation for the felonious assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from an incident in which he pistol-whipped Janice Garth, his former fiancée. Garth did not testify at the trial, but her preliminary examination testimony was read for the jury. In his sole issue on appeal, defendant challenges the admissibility of that testimony. Defendant argues that the trial court erred in determining that Garth was "unavailable" because the prosecution did not exercise due diligence in attempting to secure her presence at trial.<sup>1</sup>

The prosecution may present a witness's preliminary examination testimony at a defendant's trial if the witness is "unavailable" and the defendant had an opportunity and similar motive to develop the testimony by cross-examination. MRE 804(b)(1). In this case, defendant only challenges whether Garth was unavailable.

For purposes of the evidentiary rule, unavailability as a witness "includes situations in which the declarant . . . is absent from the hearing and the proponent of a statement has been

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<sup>1</sup> Although defendant's brief includes a single sentence mentioning his constitutional right to confront Garth, his argument focuses on whether the prosecution exercised "due diligence" to enable Garth's testimony to be admitted under MRE 804(b)(1). Defendant does not brief any constitutional aspects of the issue independent of that point.

unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). The test for due diligence "is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998) (citations omitted). "The trial court's determination [that the prosecutor exercised due diligence] will not be disturbed on appeal unless a clear abuse of discretion is shown." *Id.* (citation omitted).

Garth was served with a subpoena for defendant's trial, which was originally scheduled on July 25, 2006, but she did not appear in court. The prosecutor made no effort to contact her from that date until 3:30 p.m. on August 1, 2006, the day before defendant's trial. In the period of less than 24 hours from 3:30 p.m. on August 1 until the due diligence hearing on August 2, the police made several visits to Garth's home, left two phone messages, and spoke to her neighbor, who indicated that Garth had resumed her relationship with defendant. The police also spoke to Garth's mother, who indicated that Garth was on vacation. The efforts made in this case were tardy and were less extensive than those in *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988), *People v James (After Remand)*, 192 Mich App 568; 481 NW2d 715 (1992), and *Bean, supra*. In each of those cases, the reviewing court determined that due diligence had not been shown. Failing to make any effort to obtain Garth's attendance until 3:30 p.m. on the day before trial was not exercising due diligence, and the trial court abused its discretion in determining otherwise.

However, it is not more probable than not that the error affected the outcome of the lower court proceedings. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Apart from Garth's preliminary examination testimony, the testimony of Garth's neighbor clearly established that Garth had been assaulted, and Garth told her neighbor within minutes after the attack that that "Darrell" was the perpetrator. A police officer who immediately responded to the scene observed that Garth's face was swollen and that Garth was crying. Garth told the officer that her boyfriend was responsible for the attack and that he had hit her several times in the face with a gun. At trial, defendant admitted that he was formerly Garth's boyfriend and that he was at her home on the night of the incident. Because Garth's preliminary examination testimony was cumulative to the accounts described by other witnesses who observed Garth right after the incident, the error in admitting the testimony was harmless.

We affirm.

/s/ Donald S. Owens  
/s/ Richard A. Bandstra  
/s/ Alton T. Davis